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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1945

No. 830

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ROYAL WAYNE REA, *Petitioner*
v.
A. McDONALD, Warden
of the Federal Correctional Institution
at Texarkana, Texas
Respondent

■

ON PETITION FOR WRIT OF CERTIORARI TO
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FIFTH CIRCUIT

REPLY
to Respondent's Memorandum

HAYDEN C. COVINGTON
Attorney for Petitioner

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MAY IT PLEASE THE COURT:

Respondent attempts to limit the scope of review upon the petition for writ of habeas corpus, notwithstanding the expansion of the historic writ by Congress in the enactment of the Habeas Corpus Act, to grievous errors constituting the denial of due process that are established *de hors* the record. The Government argues that the writ is not available where the errors are apparent from the record. The Government argues that in cases where the errors are apparent of record petition for writ of habeas corpus

is "a substitute for the appeal which he failed to prosecute to a final conclusion." (Respondent's Memorandum, pp. 4-6) The Government's argument entirely ignores the proposition that if the convicting court so far departs from applicable standards of due process of law as to lose jurisdiction, such erroneous departure, even though apparent of record, is uniformly reviewable by the petition for writ of habeas corpus.

The principles announced in *Bowen* v. *Johnston,* 306 U. S. 19, are applicable here. In that case it was stated that if the absence of jurisdiction appeared on the face of the record made in the trial court upon the trial of the indictment, it would be reviewable on a writ of habeas corpus. (*ibid.* p. 26) In that decision it was also said that the general rule, that habeas corpus is not available where the question could be raised upon appeal, is "not so inflexible that it may not yield to exceptional circumstances where the need for the remedy afforded by the writ of habeas corpus is apparent." (*ibid.* p. 27) In the Rea case, at the bar, there was much uncertainty and doubt and confusion at the time of the trial as to the availability of defense to the indictment that such presents unusual circumstances warranting the writ of habeas corpus. (*ibid.* 27)

In *Johnson* v. *Zerbst,* 304 U. S. 458, the court announced a principle and made a holding that is a precedent for the action petitioner requests here. In that decision it is said: "A court's jurisdiction at the beginning of trial may be lost 'in the course of the proceedings' due to failure to complete the court—as the Sixth Amendment requires—by providing counsel for an accused who is unable to obtain counsel, who had not intelligently waived this constitutional guaranty, and whose life or liberty is at stake. If this requirement of the Sixth Amendment is not complied with, the court no longer has jurisdiction to proceed. The judgment of conviction pronounced by a court without jurisdiction is void, and one imprisoned thereunder may

obtain release by habeas corpus. A judge of the United States—to whom a petition for habeas corpus is addressed —should be alert to examine 'the facts for himself when, if true as alleged, they make the trial absolutely void.'" (*ibid.* 468) See also *Williams* v. *Kaiser,* 323 U. S. 471, 477; *Bowen* v. *Johnston,* 306 U. S. 19, 23-25; *Ex parte Siebold,* 100 U. S. 371, 375.

The denial of a constitutional right contrary to the express commands of the fundamental compact is such an error that is not only reviewable upon appeal but is also subject to review and collateral attack upon a petition for writ of habeas corpus.

It has been uniformly held that to deny a defendant in a criminal or civil case the right to be heard and to make his defenses is a rank denial of procedural due process of law. *McVeigh* v. *United States,* 11 Wall. 259, 261, 267-268; *Windsor* v. *McVeigh,* 93 U. S. 274, 277, 278-279; *Hovey* v. *Elliott,* 167 U. S. 409, 413-415, 417-418; *Bradstreet* v. *Neptune,* 3 Sumn. (U. S.) 600; *Ong Chang Wing* v. *United States,* 218 U. S. 272, 279; *Chicago M. & S. P. R.* v. *Minnesota,* 134 U. S. 418, 456-457; *United States ex rel. Trainin* v. *Cain* (CCA-2) 144 F. 2d 944; *Estep* v. *United States,* 66 S. Ct. 423, 429-433, concurring opinion of MURPHY, J. (See brief for petitioner, *Estep* v. *United States,* No. 292 Oct. Term 1945, pages 85-105.)

Moreover, to deny one the right to be heard in his defense to a criminal charge is to deny a judicial trial contrary to the bill of attainder clause of the United States Constitution, in addition to amounting to a denial of procedural due process of law. (*Cummings* v. *Missouri,* 4 Wall. 277, 320-332; *Kentucky* v. *Jones,* 10 Bush. (70 Ky.) 725.) A judgment rendered upon a trial where there has been a denial of a fundamental constitutional right or due process of procedural law is a nullity and subject to collateral attack, including attack by habeas corpus. *National Exchange Bank* v. *Wiley,* 195 U. S. 257; *Old Wayne*

Life Assn. v. *McDonough,* 204 U. S. 8, 23; *Baker* v. *Baker Eccles & Co.,* 242 U. S. 394, 401; *Griffin* v. *Griffin,* decided February 25, 1946, 14 LAW WEEK 4217, 4218.

If a judge of a federal district court refuses to conduct a judicial trial, as did the judge of the convicting court in this case, and proceeds to cut out all of the defenses and try the case by an illegal theory similar to "trial by ordeal", in violation of the due process clause of the Fifth Amendment, Clause 3 in Section 9 of Article I, prohibiting bills of attainder, and Article III investing the judicial powers in the courts and not in administrative agencies, then such federal judge *loses jurisdiction* or is ousted of jurisdiction to proceed further and pronounce sentence against petitioner. *Johnson* v. *Zerbst,* 304 U. S. 458, 468. See also *In re Rosier,* 76 U. S. App. 214, 133 F. 2d 316, 322-324 and *Jones* v. *Huff,* decided by the United States Court of Appeals for the District of Columbia, November 25, 1945, 14 LAW WEEK 2335-2336.

The fact that the writ of habeas corpus has been broadened so as to reach many different types of violations of procedural due process impels the conclusion that a denial of a judicial trial contrary to the due process clause is equally subject to attack by habeas corpus, which penetrates and goes behind the judgment and reviews the substance of the matter, either on the record or *de hors* the record, regardless of whether there has been an appeal or failure to take an appeal. The following types of errors and inquiries inflicted contrary to the Constitution have been, among many others, reviewed upon the writ of habeas corpus:

(1) Erroneous denial of a plea of former jeopardy, *Ex parte Hans Nielsen* (1889) 131 U. S. 176, 184-185; *Clowans* v. *Rives,* 104 F. 2d 240.

(2) Erroneous reception into evidence a confession obtained in violation of the due process clause by force, etc. *Jones* v. *Kentucky* (CCA-6) (1938) 97 F. 2d 335.

(3) Illegal forcing or obtaining a plea of guilty. *Waley* v. *Johnston,* 316 U. S. 101; *Smith* v. *O'Grady,* 312 U. S. 329.

(4) Proceeding to judgment of guilty after trial dominated by mob violence which could have been complained of at the trial and raised upon appeal. *Frank* v. *Mangum,* 237 U. S. 309, 330-331, 335; *Moore* v. *Dempsey,* 261 U. S. 86, 91.

(5) Trial by information for a felony contrary to the Constitution, which could have been raised upon appeal. *Ex parte Wilson* (1885) 114 U. S. 417; *Ex parte Bain* (1887) 121 U. S. 1, in which latter case the indictment was amended, without return to grand jury, by the prosecutor.

(6) Denial of trial by jury which could have been raised upon appeal. *Callan* v. *Wilson,* 127 U. S. 540.

(7) Illegal denial of counsel which could have been raised upon appeal. *Johnson* v. *Zerbst,* 304 U. S. 458, 463, 468; *Walker* v. *Johnston,* 312 U. S. 275; *United States ex rel. McCann* v. *Adams,* 320 U. S. 220, 221; *Adams* v. *United States ex rel. McCann,* 317 U. S. 269.

The denial of the right to make any and all valid defenses upon a trial is equal to, if not worse than, a denial of the right to have counsel. The Constitution guarantees both. Without the granting of either, upon request not waived, as here, the trial court loses jurisdiction to pronounce sentence. The provisions of the Constitution guaranteeing a judicial trial are equally as strong and respectable as is the provision with reference to the right to have counsel. If a defendant is deprived of the right of counsel, it does him no good to have a trial. If he is also deprived of a judicial trial and the right to be heard in his defenses it does him no good to have counsel. If habeas corpus attack collaterally made can reach the denials of one it should reach the other because there is no difference between the two rights. Cf. *United States ex rel. McCann* v. *Adams, supra,* with *Adams* v. *United States ex rel. McCann, supra.* The decision of the United States Circuit Court of Appeals

for the Eighth Circuit in *Manning* v. *Biddle,* 14 F. 2d 518, 519, is apposite here. Cf. *Potter* v. *Dowd* (CCA-7) 146 F. 2d 244.

The petition for writ of habeas corpus in this case is not a substitute for an appeal. The questions are not such as can be raised only upon appeal. The fundamental objections are such that they can be considered at any time in a collateral proceeding. The objections urged vitiate the entire proceeding and oust the convicting court of jurisdiction so as to make the sentence subject to collateral attack.

Petitioner does not suggest (as does the Government on page 8 of its Memorandum) that, if this court finds a cause for the issuance of the writ is alleged on the ground of a violation of the due process clause by the convicting court, he is entitled to an opportunity in the habeas corpus proceeding to review the illegality of the draft board determination. The proper place for such inquiry was in the convicting court. If the petitioner is discharged by the writ because of a denial of due process by the convicting court then a new trial can be had under another indictment in the United States District Court for the Western District of Oklahoma. In that event it will be unnecessary to pass upon the classification in the habeas corpus proceeding. It is only in event that it is held that there was no denial of due process of law by the convicting court that petitioner desires the court below, in this habeas corpus proceeding, to review the decision of the draft board. Contrary to the Government's suggestion in its Memorandum (p. 8), petitioner says this case should be sent back to the trial court to first decide if there was a violation of the due process of law as alleged by petitioner in the convicting court. If so, the petitioner should be ordered discharged. The court below should be instructed that only in event that it finds there was no violation of due process of law (as alleged in the petition) may it proceed to

a determination of whether the draft board violated the law in classifying petitioner.

Conclusion

WHEREFORE the petition for writ of certiorari should be granted.

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